U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 12 2005

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on April 10, 2003. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal on November 6, 2003. On November 26, 2003, the petitioner filed a motion to reopen the proceeding. The AAO granted the petitioner's motion, reopened the proceeding, and again denied the petition on February 10, 2005. The petitioner has now filed a motion to reconsider. The motion will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability and/or a member of the professions holding an advanced degree. At the time the petition was filed, the petitioner was a postdoctoral research associate at Purdue University. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO concurred with the director's finding, and dismissed the petitioner's appeal.

The petitioner's motion to reopen included new evidence regarding the petitioner's work. Counsel, in that motion, alleged factual errors and contended that the AAO's dismissal notice was based on ignorance of the evidence and prejudicial review of the record. The AAO granted that motion, discussed counsel's arguments and the newly submitted materials, and determined that the petitioner had failed to establish that the petition should have been approved. The AAO, therefore, affirmed the denial of the petition.

Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 103.5(a) state, in pertinent part:

> (3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.
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> (4) *Processing motions in proceedings before the Service.* A motion that does not meet applicable requirements shall be dismissed.

The new motion filed by counsel on the petitioner's behalf consists primarily of a two-page statement by counsel. Part of this statement relates counsel's recollection of a conversation between counsel and the director of the AAO. This portion of counsel's statement is a general introduction, rather than a specific discussion of the matter now at hand. The discussion of this proceeding occupies four paragraphs.

In the first paragraph, counsel lists the petitioner's professional accomplishments, including ten published articles and a patent. The AAO has already discussed these accomplishments in its prior decisions, and counsel's latest statement does not rebut the AAO's previous findings. A list of evidence that AAO has already considered and discussed is not grounds for reconsideration.

In the second paragraph, counsel observes that the petitioner now holds a position at Arizona State University. Counsel presents an updated list of the petitioner's professional accomplishments, and a copy of the petitioner's updated *curriculum vitae*. As cited above, 8 C.F.R. § 103.5(a)(3) requires that a motion to reconsider a decision on an application or petition must, when filed, establish that the decision was incorrect *based on the evidence of record at the time of the initial decision.* The petitioner's change of employment and his achievements *after* the date of the initial decision were clearly not part of the record at the time of that decision.

Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date based on a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). If the petitioner and his attorney believe that recent developments in the petitioner's career justify a national interest waiver, then the proper course of action would be for the petitioner to file a new petition. The petitioner's recent work does not provide a viable basis for reconsideration.

In the third and fourth paragraphs, counsel states that the petitioner's "history over the course of the proceedings with CIS has certainly shown him to be exceptional. . . . The standard here is exceptional, not extraordinary. This dedicated research scientist certainly meets that criterion." Counsel is mistaken. Pursuant to section 203(b)(2)(i) of the Act, aliens of exceptional ability must usually, as a matter of law, have a job offer with a labor certification. The national interest waiver is an added benefit over and above classification as exceptional, and therefore an alien seeking the waiver must meet a burden over and above that of an alien with a job offer and a labor certification.

Furthermore, counsel's assertion that the petitioner is "certainly . . . exceptional" represents a statement of personal opinion rather than a finding of empirical fact. Similarly, counsel avers that the petitioner is so obviously eligible for the benefit sought, that the denial of the petition can only be explained by "sloppy or incompetent" adjudication, "[b]ureaucratic inertia," and a compulsion to defend Service Center decisions regardless of merit, "like defending [redacted] or [redacted] These are statements of personal opinion rather than demonstrable issues of fact or law.

Counsel, on motion, has not demonstrated any incorrect application of law or CIS policy. Therefore, the petitioner's submission does not meet the requirements for a motion to reconsider, and thus, pursuant to 8 C.F.R. § 103.5(a)(4), the motion must be dismissed.

ORDER: The motion is dismissed.